Supreme Court, U.S.
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No. 03-254

In The
Supreme Court of the United States

CORE CONCEPTS OF FLORIDA, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The decision of the United States Court of Appeals for the Federal Circuit is fundamentally wrong. Review is warranted because this decision contravenes the separation of powers precept embedded in the Appropriations Clause, that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. CONST., art. I, § 9, cl. 7.

The Brief for the United States in Opposition is in error when it supposes that *Paul v. United States*, 371 U.S. 245, 261-63 (1963) and *United Biscuit Company of America, Inc. v. Wirtz*, 359 F.2d 206, 212-13 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 971 (1966), may be distinguished because those cases concern Federal instrumentalities which have access to public money drawn from general Treasury revenues, whereas Federal Prison Industries is limited to the money it earns from its own operations.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT CONTRAVENES THE SEPARATION OF POWERS PRECEPT.

It is beyond cavil that the funds used by Federal Prison Industries are paid out of the Treasury. Nonetheless, the United States Court of Appeals for the Federal Circuit holds that these funds are not "appropriations" because these funds are kept distinct from general Federal revenues. Pet. App. 9a-10a.

This is a distinction without a difference. Monies paid out of the Treasury, whether or not paid from funds kept distinct from general Federal revenues, are "appropriations":

> The Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute.

Office of Personnel Management v. Richmond, 496 U.S. 414, 424 (1990); *Republic National Bank v. United States*, 506 U.S. 80, 93-96 (1992).

There must be a congruence between a substantive statutory right to payment and the general appropriation for the payment of judgments, 13 U.S.C. § 1304, 41 U.S.C. § 612(a). *Office of Personnel Management*, 496 U.S. at 431-32; *Republic National Bank*, 506 U.S. at 95-96. Here the substantive right to payment is set out in 18 U.S.C. § 4126(c), an express authorization for use of the Prison Industries Fund to finance prison industry operations. It is only this substantive statutory right to payment that is disputed.

Unlike the claim made in *Office of Personnel Management*, 496 U.S. at 424, 432, or the claims made in *Furash & Co. v. United States*, 252 F.3d 1336, 1341 (Fed. Cir. 2001); in *Denkler v. United States*, 782 F.2d 1003, 1005 (Fed. Cir. 1986); and in *Kyer v. United States*, 369 F.2d

714, 718 (Ct. Cl. 1966), *cert. denied*, 387 U.S. 929 (1967), this money claim against Federal Prison Industries does not conflict with the "letter of the difficult judgments reached by Congress as to the common good." *Office of Personnel Management*, 496 U.S. at 428. Instead, the United States Court of Appeals for the Federal Circuit here relies on a judge-made doctrine, the "non-appropriated funds doctrine," and substitutes its views for those expressed by Congress in statute.

The United States Court of Appeals for the Federal Circuit has acted in violation of the separation of powers precept embedded in the Appropriations Clause by holding that the Prison Industries Fund, 18 U.S.C. § 4126, is not an "appropriation." Beyond this Constitutional trespass, the decision of the United States Court of Appeals for the Federal Circuit creates difficulties for acquisitions of goods and services funded by Federal revolving, or working capital, funds:

> One doubts whether our political leaders, our representatives, and certainly the general public, are aware of the problem that the extension of the NAFI [non-appropriated fund instrumentality] doctrine presents. It is not simply that private parties are denied an efficient juridical remedy to vindicate claims, it is that by extending this doctrine, as a way perhaps to save the taxpayer's pocket book, the unintended consequence may also create a powerful disincentive to contract with these NAFI agencies. For without a speedy, meaningful remedy for resolution of contractual disputes, we may be transforming the maxim *caveat emptor*, let the buyer beware, into *caveat pactor*, let the contractor beware. It is indeed conceivable that the extension of the NAFI

> doctrine will ultimately increase the price of government goods and services by denying the efficiency of the market place to institutions, such as private enterprise funds, ironically established to mimic the market place.

AINS, Inc. v. United States, 56 Fed. Cl. 522, 543-44 (2003).

II. STATUTE PROVIDES FEDERAL PRISON INDUSTRIES ACCESS TO PUBLIC MONEY DRAWN FROM GENERAL FEDERAL TREASURY REVENUES.

Paul v. United States, 371 U.S. 245, 261-63 (1963) and *United Biscuit Company of America, Inc. v. Wirtz*, 359 F.2d 206, 212-13 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 971 (1966), may not be distinguished because those cases concern Federal instrumentalities which have access to public money drawn from general Treasury revenues, whereas Federal Prison Industries is limited to the money it earns from its own operations. Opp. 13-14.

Federal Prison Industries supports its prison industrial labor program with a "super preference" for its products that Congress imposes on Executive branch agencies, Executive branch agencies that operate with appropriated funds drawn from general Treasury revenues:

> The several Federal departments and agencies and all other Government institutions of the United States shall purchase at not to exceed current market prices, such products of the industries authorized by this chapter as meet their requirements and may be available.

18 U.S.C. § 4124(a).

True, Federal Prison Industries operates on earnings accrued in the Prison Industries Fund, 18 U.S.C. § 4126(c)(1), but the money Federal Prison Industries so accrues comes from payments made by Executive branch agencies out of appropriated funds. Product sales by Federal Prison Industries to Executive branch agencies are "intergovernmental transfers." 18 U.S.C. § 4124(c). Intergovernmental transfers are recordable obligations of the United States. 31 U.S.C. § 1501(a)(3). With the "super preference" imposed by 18 U.S.C. § 4124(a), Congress has insured that Federal Prison Industries will have access to public money, and only public money (Federal Prison Industries cannot sell to the public in competition with private enterprise – 18 U.S.C. § 4122(a)).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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